IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAPITOL SPECIALTY INSURANCE CORPORATION, **Plaintiff,** **v.** **PTAV, INC., RJV CORP., P.M. and D.M.** **Defendants.**	**)**	**CIVIL ACTION FILE NO. 1:17-cv-01112-WSD**

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW, Plaintiff Capitol Specialty Insurance Corporation ("Capitol") and files its First Amended Complaint for Declaratory Judgment, pursuant to Fed. R. Civ. P. 15(a)(1) as a matter of course and without the need for leave of Court, respectfully showing the Court as follows:

Parties, Jurisdiction and Venue

1.

This is an action for declaratory judgment, brought pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, to declare the rights and other legal relations surrounding questions of actual controversy that presently exist between Plaintiff and Defendants.

2.

Plaintiff Capitol is a corporation organized and existing under the laws of the State of Wisconsin, maintaining its principal office and principal place of business in Madison, Wisconsin.

3.

Defendant Ptav, Inc. ("Ptav") is a corporation organized and existing under the laws of the State of Georgia. Ptav maintains its principal place of business at 3179 Peachtree Road, Atlanta, Fulton County, Georgia 30305. Ptav can be served through its registered agent, Mike Sard, who can be served with process at 3789 Roswell Road, Atlanta, Fulton County, Georgia 30342. Ptav is subject to the jurisdiction and venue of this Court.

4.

Defendant RJV Corp. ("RJV") is a corporation organized and existing under the laws of the State of Georgia. RJV maintains its principal place of business at 1842 Independence Square, Suite C, Atlanta, DeKalb County, Georgia 30338. RJV can be served through its registered agent, Katherine W. Warden, who can be served with process at 1842 Independence Square, Suite C, Atlanta, DeKalb County, Georgia 30338. RJV is subject to the jurisdiction and venue of this Court.

5.

Defendant P.M. is an individual who is a citizen and resident of the State of Georgia. P.M. has previously agreed to accept or waive service of this lawsuit. Defendant P.M. has been named as such in an effort to protect her anonymity, given the sensitive nature of the underlying allegations.

6.

Defendant D.M. is an individual who is a citizen and resident of the State of Georgia. D.M. has previously agreed to accept or waive service of this lawsuit. Defendant D.M. has been named as such in an effort to protect his anonymity, given the sensitive nature of the underlying allegations.

7.

This Court has original jurisdiction over this action under the provisions of 28 U.S.C. § 1332(a) because it is a civil action in which the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different states.

8.

The issues in controversy in this action should be determined under the laws of the State of Georgia as the insurance contract at issue was contracted for, delivered in, and was understood to be controlled by the laws of the State of

Georgia. Further, the events from which this Complaint arises occurred in the State of Georgia.

9.

There is an actual case or controversy concerning Capitol's coverage obligations, if any, for claims asserted in an underlying liability lawsuit such that this Court may declare the rights and obligations of the parties under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.

10.

Venue in this action is proper pursuant to 28 U.S.C. § 1391(b)(1) or (2) and pursuant to LR 3.1B(1)(a) or (3), NDGa.

11.

There is an actual controversy with respect to Capitol's coverage obligations, if any, under a Commercial Liability Insurance Policy for claims asserted in a liability lawsuit currently pending in Fulton County, Georgia.

Underlying Litigation

12.

On February 10, 2017, P.M. and D.M. filed suit against Ptav, RJV, and others in the State Court of Fulton County, Georgia, Civil Action File No.17EV000688, styled P.M. and D.M. v. Expose Entertainment, Inc. d/b/a Hole in the Wall, et al. ("Underlying Action"), asserting claims arising out of the alleged abduction, sexual assault, sexual battery, robbery, and rape of P.M., the wife of D.M. A true and correct copy of the Complaint filed in the Underlying Action is attached hereto as **Exhibit A.**

13.

In their Complaint, P.M. and D.M. allege that, on April 4, 2015, P.M. was abducted from certain "Property" - defined as "3167 Peachtree Road, Atlanta, Fulton County, Georgia 30305, 3171-3179 Peachtree Road, Atlanta, Fulton County Georgia 30305, and/or the ingress/egress between 3167 Peachtree Road and 3171-3179 Peachtree Road" – and taken to another location where she was burglarized, sexually assaulted, battered, and raped.

14.

P.M. and D.M. further allege that Ptav, RJV, and others owned, occupied, operated, managed, utilized, and/or secured the "Property" – defined as "3167 Peachtree Road, Atlanta, Fulton County, Georgia 30305, 3171-3179 Peachtree Road, Atlanta, Fulton County Georgia 30305, and/or the ingress/egress between 3167 Peachtree Road and 3171-3179 Peachtree Road" – where P.M. was allegedly abducted.

15.

In their Complaint, P.M. and D.M. contend that Ptav and RJV were negligent by (a) failing to warn invitees, including P.M., of the existence of criminal activity and likelihood of further criminal attacks; (b) failing to maintain adequate security devices to permit proper use of the "Property," thereby causing unreasonable risk of injury to their invitees, including P.M.; (c) failing to maintain, inspect, secure, patrol, and/or manage the "Property," thereby creating an unreasonable risk of injury to their invitees, including P.M.; (d) failing to maintain a policy, procedure, or system of investigating, reporting, and warning of the aforementioned criminal activity; (e) failing to exercise reasonable care in the hiring, training, and supervision of their employees, whom Ptav and RJV knew or should have known were not properly qualified to handle security issues; (f) failing to provide adequate security protection, including security personnel, and/or an outside security presence on the "Property"; (g) representing to their invitees, including P.M., that the "Property" was properly maintained and safe; and (h) were otherwise careless, reckless, and/or negligent.

16.

In their Complaint, P.M. and D.M. further contend that Ptav and RJV created or maintained a continuous, dangerous condition at the "Property," to wit:

failure to remedy the criminal activity at the "Property" that persisted over a period of time for which Ptav and RJV had knowledge and an opportunity to abate.

17.

P.M. and D.M. allege that, as a result of Ptav and RJV's actions and/or inactions, P.M. was abducted at the "Property" and burglarized, sexually assaulted, battered, and raped at another location; and P.M. has suffered and will continue to suffer severe mental and physical pain and suffering.

18.

Based on these allegations, P.M. and D.M. assert the following causes of action in the Underlying Action: (1) negligence; (2) nuisance; (3) loss of consortium; (4) punitive damages; and (5) expenses of litigation.

19.

RJV, in turn, filed a cross-claim against Ptav and others in the Underlying Action, alleging that Ptav is contractually obligated to defend and indemnify RJV against P.M. and D.M.'s claims pursuant to a lease agreement. A true and correct copy of RJV's Cross-Claim is attached hereto as **Exhibit B**.

20.

Capitol is currently providing a defense to Ptav in the Underlying Action under a reservation of rights. True and correct copies of Capitol's Reservation of Rights letters are attached hereto as **Exhibits C and D**.

21.

Pursuant to letter dated February 22, 2017, RJV, the landowner for the property which is occupied by Ptav, is seeking a defense and indemnification under the terms of a lease, described infra, and seeks coverage as an additional insured under the policy issued to Ptav by Capitol.

The Lease

22.

On June 4, 2012, RJV entered into a lease (the "Lease") with Peachtree Tavern, Inc., an alleged predecessor of Ptav Inc. for the lease of 4,257 of space located at 3179 Peachtree Road, Atlanta, Georgia. A true and accurate copy of the Lease provided to Capitol is attached hereto as **Exhibit E.**

23.

Paragraph 9 of the Lease provides, in pertinent part, as follows: "Lessee shall indemnify and hold harmless Lessor from and against any and all losses, damages, liabilities and claims occasioned by, and arising or resulting from or growing out of Lessee's use of the premises…."

24.

Paragraph 1 of the Lease specifically defines the leased "Premises" as "approximately 4,257 square feet of office and warehouse space in a multi-tenant building located on the real property of Lessor said space being known as 3179 Peachtree, Road Fulton County, Georgia."

25.

The parking lot, where the incident at issue in the Underlying Action allegedly originated and which was common to multiple businesses, is not included in the definition of the Premises.

26.

The Lease requires the Lessor/Landlord, RJV, to maintain all common areas, specifically including the "common paved parking areas…."

27.

Paragraph 9 of the Lease requires Peachtree Tavern, Inc. to defend, indemnify, and hold harmless RJV "for all losses, damages, liabilities and claims occasioned by, and arising or resulting from or growing out of Lessee's use of the premises, or from the conduct of Lessee's business, or from any activity, work or things done, permitted or suffered by lessee in or about the leased Premises."

28.

The Lease also requires Peachtree Tavern, Inc. to name RJV as an additional insured on its policy of insurance.

29.

In its request for indemnification, RJV claims that the Lease with Peachtree Tavern, Inc. was assigned to Ptav on September 30, 2013. Capitol has no copy of this assignment.

Insurance Policy Provisions

30.

On the date of the incident at issue in the Underlying Action, Ptav was insured by Capitol under insurance policy number BR02349086-02, which was issued to Ptav as the named insured for the period February 14, 2015 to February 14, 2016 ("Policy"). A true, complete, and certified copy of the Policy (with premium information redacted) is attached hereto as **Exhibit F.**

31.

The Commercial General Liability Coverage Form in the Policy contains two pertinent coverages: Coverage A – Bodily Injury and Property Damage, and Coverage B – Personal and Advertising Injury.

32.

Under the Coverage A Insuring Agreement, Capitol agreed, in pertinent part, to cover Ptav for its liability for "damages because of 'bodily injury' … to which this insurance applies." The Coverage A Insuring Agreement provides that "[d]amages because of 'bodily injury' include damages claimed by any person … for care, loss of services or death resulting at any time from the 'bodily injury.'"

33.

The term "bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

34.

Coverage A further provides that the insurance does not apply to the following:

b. Contractual Liability

"Bodily injury" … for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" … occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract," reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" …, provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

35.

The term "insured contract" is defined, in pertinent part, to mean:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to [Ptav] or temporarily occupied by [Ptav] with permission of the owner is not an "insured contract";

***

f. That part of any other contract or agreement pertaining to [Ptav's] business (including an indemnification of a municipality in connection with work performed for a municipality) under which [Ptav] assume[s] the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by [Ptav] or those acting on [Ptav's] behalf. However, such part of a contract or agreement shall be considered an "insured contract" to the extent [Ptav's] assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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36.

Under the Coverage B Insuring Agreement, Capitol agreed, in pertinent part, to cover Ptav for its liability for "damages because of 'personal and advertising injury' to which this insurance applies." To be covered, "personal and advertising injury" must be "caused by an offense arising out of [Ptav's] business."

37.

The term "personal and advertising injury" is defined, in pertinent part, as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses: a. False arrest, detention or imprisonment…."

38.

Coverage B further provides that the insurance does not apply to the following:

> **e. Contractual Liability**
>
> "Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.
>
> ***
>
> **f. Breach Of Contract**
>
> "Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in [Ptav's] "advertisement."
>
> ***

39.

The Policy contains an "Assault Or Battery Exclusion" Endorsement, which excludes coverage under Coverage A and Coverage B, in pertinent part, as follows:

> **"Assault or Battery" Exclusion**
>
> This insurance does not apply to, nor shall [Capitol] have a duty to defend, any claim or "suit" seeking damages or expenses due to "bodily injury" … [or] "personal and advertising injury" … arising out of, resulting from, or in connection

with any of the following acts or omissions regardless of their sequence or any concurring cause:

a. "Assault or battery," whether or not caused or committed by or at the instruction of, or at the direction of or arising out of the negligence of [Ptav], any insured, any person or legal entity, or any causes whatsoever;

b. The suppression or prevention of, or the failure to suppress or prevent "assault or battery" by [Ptav], any insured, or any person or legal entity;

c. The failure by [Ptav], any insured, or any legal entity to provide an environment safe from "assault or battery", including but not limited to the failure to provide adequate security, or the failure to warn of the dangers of the environment which could contribute to "assault or battery" or failure to maintain the premises by [Ptav], any insured or any person or legal entity;

d. The negligent employment, investigation, hiring, supervision, training, retention, or any other employment related practice by any insured or any person or legal entity, including but not limited to contractors or subcontractors;

e. The use of any force to protect persons or property whether or not the "bodily injury" … [or] "personal or advertising injury" … was committed by or at the direction of [Ptav], any insured or any person or legal entity;

f. The rendering of or failure to render or secure treatment or care necessitated by any "assault or battery" by [Ptav], any insured or any person or legal entity;

g. The reporting to the proper authorities or failure to do so by [Ptav], any insured, or any person or legal entity; or

h. Caused by, arising out of or resulting from the intoxication of any person.

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40.

The "Assault Or Battery Exclusion" Endorsement contains the following definition of "Assault or Battery":

"Assault or battery" means:

a. Assault, including sexual abuse, sexual assault, intimidation, sexual harassment, verbal abuse, and any threatened harmful or offensive contact between two or more persons, whether or not caused or committed by or at the instruction of, or at the direction of, or arising out of the negligence of [Ptav], any insured, any legal entity, or any causes whatsoever, regardless of fault or intent; and

b. Battery, including sexual abuse, sexual battery, sexual molestation, any physical altercation and any actual harmful or offensive contact between two or more persons, whether or not caused or committed by or at the instructions of, or at the direction of, or arising out of the negligence of, [Ptav], any insured, any legal entity, or any causes whatsoever, regardless of fault or intent.

41.

The Policy also contains an "Exclusion – Punitive Or Statutory Damages" Endorsement, which excludes coverage under Coverage A and Coverage B as follows:

> **Punitive Or Statutory Damages**
>
> This policy covers only compensatory damages. It does not cover:
>
> (1) Punitive;
>
> (2) Exemplary; or
>
> (3) Statutory damages (such as multiplied damages, costs, expenses or attorney's fees).
>
> (4) Fines, fees or penalties.

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42.

The Policy also contains an "Excess Provision" Endorsement, which provides that "[t]his insurance is excess over any other valid and collectible insurance, whether primary, excess, contingent, or on any other basis."

43.

Pursuant to an amendment to the Policy, RJV was listed as an additional insured on the Policy effective April 21, 2015, approximately three weeks after the incident at issue in the Underlying Action. A true and accurate copy of the Additional Interest Schedule reflecting this change is attached hereto as **Exhibit G**.

44.

The request for RJV to be listed as an additional insured was received by Capitol on April 21, 2015, sixteen days after the incident complained of in the Underlying Action. A true and accurate copy of the correspondence requesting this change is attached hereto as **Exhibit H.**

Declaratory Judgment

45.

There is no coverage for any of the claims asserted in the Underlying Action, including RJV's cross-claim, pursuant to the unambiguous terms of the "Assault Or Battery Exclusion" Endorsement.

46.

P.M. and D.M.'s claims for pure emotional distress do not constitute "bodily injury" as defined by the Policy.

47.

Any "personal and advertising injury" is not covered because it was not caused by an offense arising out of Ptav's business.

48.

Coverage is excluded for any "bodily injury" or "personal and advertising injury" for which Ptav is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

49.

There is no "insured contract," as defined in the Policy.

50.

Coverage is excluded for any "personal and advertising injury" arising from breach of contract.

51.

Coverage is excluded for any punitive damages; exemplary damages; statutory damages (such as multiplied damages, costs, expenses or attorney's fees); or fines, fees, or penalties sought in the Underlying Action.

52.

To the extent any coverage is available under the Policy, such coverage is excess over any other valid and collectible insurance.

53.

Based on all the terms, conditions, exclusions, definitions, and endorsements in the Policy (whether expressly mentioned or identified in this Complaint or not), as well as under relevant legal principles and public policy considerations, Capitol is entitled to a declaration that it has no duty to defend or indemnify any party for any of the claims asserted in the Underlying Action.

54.

Even if there are any allegations which fall within the coverage of the Policy, Plaintiff asserts that RJV would not be entitled to coverage under the Policy as it does not fit within the definition of "Who is an Insured" under the Policy and was not listed as an additional insured until after the date of loss.

55.

Further, given the exclusionary endorsement regarding punitive or statutory damages, Plaintiff believes it has no duty to indemnify either Ptav or RJV, or any other party, for the claims related to punitive damages and attorney's fees asserted in the Underlying Suit.

56.

Therefore, Plaintiff believes it has no duty to defend either Ptav or RJV, or any other party, for the claims asserted in the Underlying Suit.

57.

Reasonable minds could not differ as to the conclusion that the allegations all fall within the "Assault or Battery Exclusion" Endorsement. Further, reasonable minds could not differ as to the conclusion that coverage is also excluded for RJV as it does not meet the definition of Who is an Insured and was not listed as an additional insured until after the date of loss.

58.

Reasonable minds could not differ as to the conclusion that the Cross-Claim brought by RJV is excluded by the exclusion related to Contractual Liability. Further, reasonable minds could not differ as to the notion that the damages claimed by RJV in the Cross-Claim do not fall within the definition of "bodily injury," "property damage," or "personal and advertising injury" under the Policy.

59.

Plaintiff Capitol asserts that a genuine dispute exists regarding the coverage issues mentioned above and that a declaratory judgment is necessary to clarify this uncertainty. There is such immediacy of choice imposed upon Capitol at this time as to justify an adjudication by declaratory judgment. See Richmond v. Ga. Farm Bureau Mut. Ins. Co., 140 Ga. App. 215, 217 (1976).

60.

If Plaintiff Capitol's contentions are correct, then it would be under no duty to continue defending the Underlying Action and would be under no obligation to pay any judgment in connection with the above-described acts. By refusing to defend Ptav, Capitol would lose all opportunity to contest the liability of the alleged insured or the alleged injured parties' right to recover. Thus, Capitol requires the declaration from the Court, and without such a declaration it exposes itself to a charge of and penalty for breach of contract in this State.

61.

Therefore, Plaintiff is also placed in jeopardy by the continued expense of defending Ptav in the Underlying Action until it receives a declaration of rights and duties it seeks from the Court.

62.

Plaintiff Capitol has acted properly and promptly by reserving its rights, investigating the grounds for non-coverage upon receiving the notice of claim, notifying the insured of its intent to seek a declaratory action, and now seeking declaratory relief.

WHEREFORE, Plaintiff Capitol prays for the following relief:

(a) That process and summons issue to each of the Defendants herein and that service on the Defendants be had as required by law;

(b) For declaratory judgment that Capitol owes no duty to defend or indemnify any party for any of the claims asserted in the Underlying Action;

(c) That the Court convene a jury to resolve all issues so triable;

(d) Costs of this action; and

(e) Such other and further relief as this Honorable Court may deem just and proper under the circumstances.

This 30th day of March, 2017.

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